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Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~1126~~ 226

STATE OF NEW MEXICO
ex rel., GRINNELL COMPANY, a Colorado Corporation,
GRINNELL COMPANY, INC., a Delaware Corporation,
GRINNELL CORPORATION, a Delaware Corporation,
Petitioner,

vs.

THE HONORABLE D. A. MACPHERSON, JR.,
Judge of Division Four of the District
Court of The Second Judicial District
of the State of New Mexico

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

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THE HONORABLE D. A. MACPHERSON, JR.,
Judge of Division Four of the District
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, State of New Mexico, *ex rel.* Grinnell Company, a Colorado corporation, Grinnell Company, Inc., a Delaware corporation, and Grinnell Corporation, a Del-

aware corporation, hereby respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of the State of New Mexico discharging an alternative writ of prohibition against the above-named respondent and permitting such respondent to take jurisdiction of a tort action against all of the relators on grounds that such relators are subject to the jurisdiction of such respondent court as "one giant operation of one octopus corporation."

Opinions Below

The proceeding below was an original proceeding in the Supreme Court of the State of New Mexico upon a petition for an alternative writ of prohibition. The opinion of that Court ordering the discharge of such writ is reported at _____ N. M. _____, 309 P.2d 981, and a copy thereof is annexed hereto as Appendix A. The order of the respondent trial court denying relators' motions for summary judgment and to quash service of process on Grinnell Company, Inc. and Grinnell Corporation, without opinion, is annexed hereto as Appendix B.

Jurisdiction

The order of the New Mexico Supreme Court here sought to be reviewed was filed on March 29, 1957. A petition for rehearing was not filed. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. Section 1257(3).

A further ground on which the jurisdiction of this Court is invoked is the importance of the New Mexico Supreme Court's decision to the national business community. That decision effectively abolishes any distinction between parent and subsidiary or sister corporations for jurisdictional purposes. That decision is without persuasive

precedent in any case, and it stands in direct conflict with decisions of this Court and with principles of law generally deemed well-established. To allow that decision to stand and to be followed by courts in other states will force the national business community to reorganize the basic patterns of distribution and corporate organization developed under prior law and now commonly adopted by firms selling in the national market.

Recognized authorities have noted that, "Recent years especially have seen an increasing use of the subsidiary-parent structure."[1] A Securities and Exchange Commission survey of 1937 disclosed that 98% of all corporations, whose securities were listed on an exchange and registered with the Commission, having assets in excess of $50,000,000 had active subsidiaries. Moreover, 58% of all listed corporations regardless of assets had at least one subsidiary.[2] Although no statistical studies have been made of the growth of the subsidiary-parent structure in years following World War II, the advantages of that structure described in the Douglas article noted below remain applicable:

> "The reasons for the use of this structure are manifold. The increased facility in financing; the desire to escape the difficulty, if not the impossibility, of qualifying the parent company as a foreign corporation in a particular state; the avoidance of complitions involved in the purchase of physical assets; the retentior of the good will of an established business unit; the avoidance of taxation; the avoidance of cumbersome management structures; the desire for limited liability, are among the primary motives."

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[1] William O. Douglas, *Insulation From Liability Through Subsidiary Corporations*, Part I, 39 YALE L.J. 193 (1929)

[2] S.E.C., SURVEY OF AMERICAN LISTED CORPORATIONS, PART I (1940).

Accordingly, it may reasonably be concluded that the use of such structure has become increasingly common during the past decade.

The New Mexico Supreme Court's decision below strikes a body blow against the widespread use of marketing subsidiaries in the national business community. That decision holds that process of a state court may run against a foreign corporation *solely* because that corporation has authorized its wholly-owned subsidiary (or sister corporation[3]) doing business in the state to use a tradename also used by it. That Court did not find that the subsidiary was the agent of the foreign corporation, and the record shows that the subsidiary was not assimilated by the parent (or by its sister corporation) or otherwise a sham entity under criteria heretofore universally recognized. Since the right to a tradename associated with a product is commonly granted to dealers in such product, that decision in effect destroys the jurisdictional insulation heretofore granted to a foreign parent corporation through the use of a structure of subsidiaries. Deprivation of such recognized rights flies in the face of due process and other Constitutional requirements and, if followed in other states, will require profound and costly changes in the structures of corporate enterprise.

Repudiation of the established jurisdictional insulation of a parent corporation from the operations of a wholly-owned but truly independent subsidiary not acting as its agent should not be permitted to stand. The changes in the form and manner of doing business in the national community which such repudiation will likely cause will have

[3] The term "sister corporation" is used herein to refer to one of two corporations both of which are wholly-owned subsidiaries of a common parent.

an effect on the values of the national community incommensurate with the value in securing to the tort and subrogation claimants below rights which they long delayed asserting.

Questions Presented For Review

1. May a state court, consistent with the due process of law required by the Fourteenth Amendment to the United States Constitution, take and exercise jurisdiction over a foreign corporation solely on the ground that such foreign corporation's wholly-owned subsidiary or sister corporation is doing business in such state and advertises its products under a tradename used by such foreign corporation, without any proof that such subsidiary or sister corporation is the agent of such foreign corporation or is a sham or otherwise not possessed of an independent business existence?

2. May a state court, consistent with the paramount power of the Congress to regulate interstate commerce under Article I, Section 8, Clause 3 of the United States Constitution, create a deterrent to and a burden upon interstate commerce by taking and exercising jurisdiction over a foreign corporation on the ground specified in Question 1?

Constitutional Provisions Involved

1. Amendment XIV to the Constitution of the United States, Section 1, Clause 2: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

2. Constitution of the United States, Article I, Section 8, Clause 3: "The Congress shall have Power . . . To regulate Commerce . . . among the several States, . . ."

Statement of the Case

1. *Chronology.* On February 3, 1956, Larnie Schultz and the Hartford Accident and Indemnity Company filed a complaint in the District Court of the Second Judicial District of New Mexico, sitting in Bernalillo County, New Mexico, naming "Grinnell Company" as defendant. (Tr. 1, 54)[4] That complaint sought recovery by Schultz for injuries received on January 11, 1954, and by Hartford, by subrogation, of the amount of its liability to Schultz under the New Mexico Workmen's Compensation Act. Tr. 7) That complaint alleged that the defendant was a foreign corporation authorized to do business in New Mexico, that a metal hanger whose alleged defective condition caused Schultz' injuries was manufactured by the defendant, and that the defendant was negligent in such manufacture. (Tr. 7, 8)

Summons was issued on February 3, 1956 (Tr. 11), and service was made on Grinnell Company's statutory agent in New Mexico. On February 16, 1956, service was also made upon the Secretary of State for the purpose of attempting service upon "Grinnell Company, at its Home Office in Providence, Rhode Island." (Tr. 11, 13) Such service on the Secretary of State admittedly did not comply with the applicable statute authorizing constructive service on unqualified foreign corporations doing business in New Mexico, Section 21-3-6 New Mexico Statutes Annotated 1953. (Tr. 2, 54)

Grinnell Company filed an answer to the complaint on March 14, 1956, in which it admitted that it was authorized to do business in New Mexico but denied that it manufactured the metal hanger in question and set up affirmative

[4] Page numbers refer to the transcript of the record in this case.

defenses. (Tr. 2, 54) Thereafter, that defendant served certain interrogatories and took the depositions of the plaintiff Schultz. (Tr. 57)

On June 18, 1956, the defendant Grinnell Company moved for summary judgment (Tr. 15); Grinnell Company, Inc. moved to quash service of process upon it on the principal ground, shown by affidavit, that it did no business in New Mexico (Tr. 18, 20); and Grinnell Corporation moved to quash service of process upon it on the same principal ground (Tr. 23, 25). On June 26, 1956, the plaintiffs served interrogatories upon Grinnell Company (Tr. 27), Grinnell Company, Inc. (Tr. 34), and Grinnell Corporation (Tr. 37). Those corporations filed answers thereto, which are annexed hereto as Appendices C, D, and E, respectively (Tr. 40-51). On October 4, 1956, the trial court denied each of the aforesaid motions without opinion. (Tr. 52)

On October 17, 1956, a petition for writ of prohibition was filed in the New Mexico Supreme Court. (Tr. 1) That Court on October 17, 1956, issued its alternative writ of prohibition to the respondent herein. (Tr. 53) The respondent's response to that petition was filed on October 31, 1956. (Tr. 54) On March 29, 1957, the Court filed its order (Tr. 106) and opinion (Tr. 91) discharging the alternative writ. Notice of the filing of this Petition was filed on April 18, 1957. (Tr. 106)

2. *Material Facts.* The pertinent facts, either admitted or clear and uncontradicted on the record, may be summarized as follows:

(a) Grinnell Company is a Colorado corporation qualified to do and doing business in New Mexico. It neither manufactured nor sold the metal hanger alleged to have caused Schultz' injury. (Tr. 16)

(b) Grinnell Company, Inc. is a Delaware corporation not qualified to do business in New Mexico and not in fact doing business therein. It sold the metal hanger in question to Schultz' employer but did not manufacture it. (Tr. 20)

(c) Grinnell Corporation is a Delaware corporation not qualified to do business in New Mexico and not in fact doing business therein. It manufactured the metal hanger and sold it to Grinnell Company, Inc. (Tr. 25)

(d) Grinnell Company and Grinnell Company, Inc. are both wholly-owned subsidiaries of Grinnell Corporation, and the directors and executive officers of the subsidiaries are also directors and executive officers of the parent. The home offices of the subsidiaries are located at the same address as the home office of the parent. (Tr. 41, 49)

(e) The subsidiaries employ and pay their own employees, none of whom is an employee of the parent. (Tr. 50)

(f) Each subsidiary conducts its own business, which is entirely separate and distinct from the other's and from the parent's. The parent is engaged in manufacturing; the subsidiaries do not manufacture, but sell in their respective trade territories goods purchased by them from the parent and other manufacturers. (Tr. 41, 49)

(g) Each subsidiary owns and maintains its separate books, records, and bank accounts. (Tr. 41)

The respondent failed to introduce any facts contrary to the foregoing, nor did he attempt to discover by interrogatories whether the subsidiaries were inadequately capitalized and financed, whether the day-to-day operations of their businesses were kept separate from each other and from the parent's, whether the formalities of corporate independence were regularly observed in such circumstances as meetings of the boards of directors of the respective corporations. Accordingly, the separation of the three corporations in those respects should be taken as true for purposes of this proceeding.

The sole evidence relied upon by the respondent and by the Supreme Court below to support its decision is the fact that the three companies use the trademark or name "Grinnell" in connection with the advertisement of products manufactured by Grinnell Corporation. There was, however, no showing that either Schultz or his employer had ever seen any such advertising, that the use of that tradename to identify the offices to which sales inquiries or orders should be directed by customers was relied upon in any respect by Schultz or his employer, or that either was misled by such advertising to believe that a single corporation was involved.

3. *Constitutional Questions Raised Below.* The Constitutional questions sought to be reviewed are implicit in the very nature of a proceeding for a writ of prohibition against the exercise of jurisdiction over a foreign corporation. Those questions were first expressly raised by Petitioner in the Reply Brief, as follows:

> "Instead of focusing his argument on the vital point at issue, respondent has attempted to cloud the *applicable legal principles relating to the due process requirements of personal service on and jurisdiction*

> *over foreign corporations.* He cites *International Shoe Company v. Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945), for the proposition that 'doing business' is no longer a constitutional requirement for jurisdiction over a foreign corporation (Answer Brief 10, 11). Clearly, the respondent has misinterpreted the *International Shoe* case, although he cites *French v. Gibbs*, 189 F. 2d 787 (2nd Cir. 1951), and *Latimer v. S/A Industries Reunidas*, 175 F. 2d 184 (2nd Cir. 1949), in which that case is clearly explained by Judge Learned Hand."

Those questions were also passed upon by the New Mexico Supreme Court in its opinion, as follows:

> "A more liberal policy has grown up over the years with respect to what affords due process as to a foreign corporation doing business in another state than that of its creation. Especially is this true in setting up criteria by which its activities are to be judged in a determination whether it is doing business within a sister state, so as to subject it to suits in the courts of such state. See the illuminating opinion of Mr. Chief Justice Stone in International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057, and annotation at 1068."

POINT I

Exercise of Jurisdiction by the Respondent Court over Grinnell Corporation and Grinnell Company, Inc. Violates the Rights of Those Corporations Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as Heretofore Interpreted by this Court.

Long ago, in *St. Clair v. Cox*, 106 U.S. 350, 27 L. Ed. 222, 1 S. Ct. 354 (1882), this Court held the doctrine of

Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed 565 (1877); applicable to foreign corporations. It is now fundamental that a state court may not constitutionally acquire or exercise *in personam* jurisdiction over a foreign corporation unless the corporation "consents" thereto, is "present" or "found" within the state, is "doing business" within the state, or has "certain minimum contacts" with the state so as to make fair and reasonable the exercise of such jurisdiction. A foreign corporation having "no contacts, ties, or relations" with the forum state may not, consistently with due process requirements, be subjected to the jurisdiction of the courts of such state. *International Shoe Co. v. Washington*, 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945).

In this case it is not contended by respondent that Grinnell Corporation or Grinnell Company, Inc. have any "contacts, ties, or relations" with New Mexico, except through Grinnell Company. That corporation is a subsidiary of Grinnell Corporation and a sister corporation of Grinnell Company, Inc.

The most recent decision of this Court directly on the question of whether a foreign corporation may constitutionally be subjected to the jurisdiction of a state with which its only contact lies in its relations with its wholly-owned subsidiary is *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 69 L. Ed. 634, 45 S. Ct. 250 (1925). In that case a North Carolina contract claimant brought an action in a North Carolina court against Cudahy Packing Company, a Maine corporation, and effected service of process upon the statutory agent in North Carolina of Cudahy Packing Company of Alabama, an Alabama corporation maintaining an office and doing business in North Carolina, which was a wholly-owned subsidiary of the Maine corporation. The defendant removed the action to the Federal court and moved

to set aside summons and dismiss the action for lack of jurisdiction. On appeal from the granting of that motion, this Court affirmed.

The opinion of Mr. Justice Brandeis in that case points out that the subsidiary was "immediately and completely" dominated by the parent, which employed the subsidiary as its "instrumentality" for marketing its products in North Carolina:

> "The Alabama corporation, which has an office in North Carolina, is the instrumentality employed to market Cudahy products within the state; but it does not do so as defendant's agent. It buys from the defendant and sells to dealers. In fulfilment of such contracts to sell, goods packed by the defendant in Iowa are shipped direct to dealers; and from them the Alabama corporation collects the purchase price. Through ownership of the entire capital stock and otherwise, the defendant dominates the Alabama corporation, immediately and completely; and exerts its control both commercially and financially in substantially the same way, and mainly through the same individuals, as it does over those selling branches or departments of its business not separately incorporated which are established to market the Cudahy products in other states. The existence of the Alabama company as a distinct corporate entity is, however, in all respects, observed. Its books are kept separate. All transactions between the two corporations are represented by appropriate entries in their respective books in the same way as if the two were wholly independent corporations. This corporate separation from the general Cudahy business was doubtless adopted solely to secure to the defendant some advantage under the local laws."

Because the subsidiary was not an agent of the parent and its business had not been assimilated by the parent, this Court held that the subsidiary, though merely formally separate from the parent was "real" and "not pure fiction". Accordingly, there was no ground on which to establish jurisdiction over the parent solely on the basis of its relation to its subsidiary.

The doctrine of the *Cudahy* case was thereafter applied by this Court in *Consolidated Textile Corp. v. Gregory*, 289 U.S. 85, 77 L. Ed. 1047, 53 S. Ct. 529 (1933). That case came up on an appeal from an order of the Supreme Court of Wisconsin discharging an alternative writ of prohobition, and it is procedurally similar to this case.

This Court has most recently cited the *Cudahy* case with approval in *National Carbide Corp. v. Commissioner*, 336 U.S. 422, 93 L. Ed. 779, 69 S. Ct. 726 (1949), for the proposition that the "owner" of a subsidiary is not thereby subject to service of process. *Cudahy* has never been overruled nor criticized by this Court. It is a foundation stone in the legal architecture of our society and should be determinative of this case.

The New Mexico Supreme Court distinguished the *Cudahy* case on the grounds that Grinnell Corporation (and presumably Grinnell Company, Inc.) was not sufficiently separate from Grinnell Company to fall within the *Cudahy* doctrine. The opinion cites an article at 56 Columbia Law Review 394, which in turn cites *Gray v. Eastman Kodak Co.*, 53 F. 2d 864 (E.D. Pa. 1930). That case, however, is not in point because the court there held in accordance with *Cudahy*, stating:

> ". . . . The doctrine of the Cannon and other cases is that the inference of the maintenance of a place

> of business or of an office by a given defendant cannot be inferred alone from its practical control of the business through stock ownership or otherwise. *There must be evidence that the served defendant itself maintained the office or place of business.*" [Italics added.]

The court found that the named defendant in fact maintained an office in the jurisdiction of the forum. Such a finding was not and could not have been made in this case by the New Mexico Court because none of the relator corporations maintains *any* business establishment in *New Mexico*.

There is clearly no basis in the record of this case or in the opinion of the New Mexico Court to distinguish *Cudahy*. Though the directors and executive officers of Grinnell Company and Grinnell Company, Inc. be the same as Grinnell Corporation, that was true of Cudahy Packing Company and Cudahy Packing Company of Alabama. Decisive is the fact that each relator corporation maintains its own books and records, employs and pays its own employees, and otherwise operates independently. The subsidiaries purchase the goods of the parent and other suppliers for resale as dealers; they do not act as agent. It has not been alleged or argued by respondent that they are not adequately financed and capitalized, that their day-to-day business is not conducted separately, or that the formalities of separate corporate existence and actions are not carefully observed in such matters as meetings of their respective boards of directors.

The New Mexico Court's decision actually rests *solely* upon the content of a single advertising brochure and a catalog of "Grinnell" products. Clearly, the use of the trade-name "Grinnell" is not evidence of assimilation of otherwise

separate businesses. In *Cudahy* this Court stated that the subsidiary was used as an "instrumentality" to market "Cudahy products," yet sustained the jurisdictional insulation of the parent. Sale of "Grinnell products" by Grinnell Company and Grinnell Company, Inc. under identical circumstances should have no different effect.

Mere reference in advertising to "the Grinnell of today" or other words referring to the overall enterprise or "system" should not be deemed sufficient to support a finding that otherwise separate businesses have been assimilated. There is no showing in this record that either Schultz or his employer was aware of such advertising or relied thereon. *Cf. Bergenthal v. State Garage & Trucking Co.*, 179 Wis. 42, 190 N.W.901 (1922); *Berkey v. Third Avenue Ry.*, 244 N.Y. 84, 155 N.E. 58 (1926); *Stone v. C.C.C. & St. L. Ry.*, 202 N.Y. 352, 95 N.E. 816 (1911); and the illuminating discussion thereof in Douglas, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 197, 198 (1929).

The following statement quoted by the New Mexico Court from the "Grinnell" catalog:

> "Through *its* Supply Sales Division, which operates *its* Branch Warehouses, *the Company* sells both Grinnell manufactured and purchased piping products to a wide variety of customers, . . ." [Italics added.]

shows only that Grinnell Company, Inc. (the publisher and copyright owner of the catalog) conducts an independent business and operates *its* Branch Warehouses through *its* Supply Sales Division entirely separate from Grinnell Corporation, the manufacturer, and Grinnell Company, its sister corporation. Certainly that statement cannot support

a conclusion that the business of Grinnell Company, Inc. has been assimilated by its parent or by its sister corporation.

Since *Cudahy* cannot reasonably be distinguished from this case, denial of the writ of certiorari or otherwise allowing the decision below to stand will virtually destroy the *Cudahy* doctrine and cause confusion in the business community. The *Cudahy* doctrine represents sound policy and should be reaffirmed. The virtue of the *Cudahy* doctrine is the flexibility it makes possible in the form and manner of business organization. It permits corporate management to choose among alternatives the form of corporate structure suited to the particular line of business or to a particular operation with sure knowledge of the effect of the choice on the distribution of business risks. Thus, certain operations or product lines may most efficiently be conducted by a single corporate organization, while other operations may be conducted through a series of separate corporate entities with more efficiency and less risk to the enterprise as a whole. The *Cudahy* doctrine frankly recognizes that a subsidiary corporation conducting an independent business in its own right will provide jurisdictional insulation for the parent, just as the corporate form itself provides jurisdictional insulation and limited liability for individual stockholders.

The decision of this Court in the *International Shoe* case announcing new criteria for determining when a corporation having *some* "contacts, ties, or relations" with the forum through its agents may be subjected to jurisdiction, makes desirable the present reaffirmance of the *Cudahy* doctrine. It should be made completely clear that the *Cudahy* doctrine remains the constitutional law of the land, and that a corporation may not be sued in a jurisdiction with which it has *no* "contacts, ties, or rela-

tions" except through its wholly-owned subsidiary, notwithstanding that a local court might deem such exercise of jurisdiction greatly to the "convenience" of, or in the interests of "substantial justice" to, a local claimant.

If the decision of the New Mexico Court is allowed to stand the *Cudahy* doctrine will be, in effect, overruled. That decision holds that mere use of a common tradename for advertising purposes is sufficient to obliterate any distinction between parent and subsidiary or between sister corporations. Since the use of tradenames, *e.g.*, "Ford," "Coca-Cola," "Hart, Schaffner & Marx," is common in the national market, the jurisdictional insulation provided by the *Cudahy* doctrine will for all practical purposes be destroyed.

POINT II

Exercise of Jurisdiction by the Respondent Court over Grinnell Corporation and Grinnell Company, Inc. Conflicts with the Paramount Power of Congress Under the Commerce Clause of Article I, Section 8, Clause 3 of the Constitution of the United States as Heretofore Interpreted by this Court.

Even if Grinnell Corporation and Grinnell Company, Inc. should be deemed to have some "contacts, ties, or relations" with New Mexico so as to satisfy minimal due process requirements, maintenance of suit against them in that jurisdiction would impose oppressive and unreasonable burdens upon the interstate commerce conducted by those corporations in violation of the Commerce Clause.

In *Michigan Central R. Co. v. Mix*, 278 U.S. 492, 73 L. Ed. 470, 49 S. Ct. 207 (1929), this Court reversed an order of the Supreme Court of Missouri dismissing a peti-

tion for an alternative writ of prohibition against a state court, in which the railroad had been sued by a local resident for damages for an accident occurring in Michigan. The railroad did not operate any line in Missouri and was not qualified to do or doing any business there, other than "soliciting freight for transportation in interstate commerce." This Court's decision rested upon the "heavy burden" imposed on interstate commerce by permitting such actions, minimal requirements of due process having apparently been satisfied by service on the railroad's soliciting agent.

The *Mix* case was followed by this Court in *Denver & Rio Grande W. R. Co. v. Terte,* 284 U.S. 284, 76 L. Ed. 295, 52 S. Ct. 152 (1932), in holding a suit in Missouri by a resident of that state against a railroad doing no other business in Missouri than soliciting traffic to recover for injuries sustained in Colorado unreasonably burdensome upon interstate commerce. That case also came up on appeal from a denial by the Missouri Court of an alternative writ of prohibition.

Both the *Mix* and *Terte* cases were thereafter cited with approval by this Court in *Baltimore & Ohio R. Co. v. Kepner,* 314 U.S. 44, 86 L. Ed. 28, 62 S. Ct. 6 (1941), and in *Miles v. Illinois Central R. Co.,* 315 U.S. 698, 86 L. Ed. 1129, 62 S. Ct. 827 (1942).

The doctrine of those cases is applicable here. The state court action instituted by Schultz and the insurer sought recovery for injuries sustained in New Mexico, but the grounds for recovery alleged (1) negligence in the manufacture of the metal hanger, and (2) a warranty of its fitness for use by the seller thereof. Since neither the manufacture of the hanger by Grinnell Corporation nor its sale

by Grinnell Company, Inc. occurred in New Mexico, suit against those corporations in New Mexico will constitute an oppressive and unreasonable burden upon interstate commerce in the products manufactured and sold by them within the purview of the *Mix* and *Terte* cases.

Moreover, if the *Cudahy* doctrine is repudiated by allowing the decision of the New Mexico Supreme Court to stand, the consequences will create a real and oppressive burden on national business corporations operating in the national market through subsidiaries. The existing corporate structure of large businesses is based upon a careful allocation of business risks, which the certainty afforded by the *Cudahy* doctrine makes possible. Abrogation of that doctrine will require fundamental changes in structure to compensate for the additional uncertainty and risk created thereby. Such changes will be expensive and troublesome to devise and carry out; they will create burdens far exceeding any burden arising from the *inconvenience* thought decisive by this Court in the *Mix* and *Terte* cases.

POINT III

The Decision of the New Mexico Supreme Court is Without Precedent and is Contrary to Decisions of this Court and Other Federal Courts.

The cases cited by the New Mexico Supreme Court as "ample authority" to support its decision do not in fact do so. Moreover, its decision is contrary to the *Cudahy* case and to many other Federal decisions. Set forth under this point are brief statements showing the grounds for distinguishing cases cited by that court and brief citations of the pertinent Federal cases contrary thereto.

Compania de Astral, S.A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357, 108 A.2d 372, 49 A.L.R. 2d 646 (1954), *cert. denied* 348 U.S. 943, involved the constitutionality of a Maryland *statute* subjecting to suit by residents any foreign corporation on claims arising out of a contract made in Maryland or a tort committed in that state. The coroprate defendant was a Panamanian corporation not doing any business in the United States, except that the contract on the basis of which suit was brought had been made in Maryland. The court sustained the constitutionality of that statute relying upon an analogy to non-resident motorist statutes and upon the existence of the "minimum contacts" required by the *International Shoe* case.

That case is completely irrelevant here. For it is admitted by all parties that Grinnell Company is "doing business" in New Mexico and has appointed an agent in that state to receive service of process. The question here is rather whether Grinnell Corporation and Grinnell Company, Inc., which admittedly have *no* "contacts, ties, or relations" with New Mexico apart from their c rporate relationship to Grinnell Company, may be subjected to the jurisdiction of New Mexico through service of process on Grinnell Company.

Pergament v. Frazer, 93 F. Supp. 9 (E.D. Mich. 1949), was a denial of a motion to dismiss a complaint in a stockholder's action against the parent where service was had on a subsidiary on the grounds that sufficient facts had not been shown by the defendant to rebut plaintiff's showing that the parent treated the subsidiary as its "sales agent." The court stated, in pertinent part:

> ". . . The test of whether or not the parent is actually doing business in Michigan so as to subject its subsidiary to process bringing the parent company

within the jurisdiction lies in the facts as they are developed and we have not sufficient of these facts before us.

". . . It is possible and permissible for a corporation not to desire to do business in a certain state and to create a separate corporation for that purpose.
". . . the facts when finally before this court in detail might be sufficient to sway the court's present opinion to an opposite holding."

Clover Leaf Freight Lines, Inc. v. Pacific Coast Wholesalers Assn., 166 F.2d 626 (7th Cir. 1948), is completely irrelevant here. Service on a subsidiary was there held service on the parent on grounds of a clear *agency relation* between the corporations. There are *no* facts in the record of this case from which there could be inferred any agency relation between Grinnell Company and its parent and sister corporations, and the New Mexico Supreme Court did not so find.

Bach v. Friden Calculating Machine Co., 167 F. 2d 679 (6th Cir. 1948), is clearly distinguishable on the grounds that the *individual* served with process was on the proven facts an *agent* of the corporation.

S. O. S. Co. v. Bolta Co., 117 F. Supp. 59 (N. D. Ill. 1953), is distinguishable on the grounds that the "management contract," referred to in the excerpt quoted in the New Mexico Court's opinion, deprived the subject corporations of any real existence. Under that contract the dominant corporation provided "personnel, management, clerical, accounting, secretarial, purchasing, production, planning, shipping, receiving and warehouse services" in consideration of 4% of the servient corporations' net sales. Such domination represents complete assimilation of the

business of the servient corporations; no such facts are shown on this record.

General Electric Co. v. Masters Mail Order Co., 122 F. Supp. 797 (S. D. N. Y. 1954), is distinguishable on the grounds that the sister corporation on which process was served clearly acted as the agent of the defendant.

Industrial Research Corp. v. General Motors Corp., 29 F. 2d 623 (N.D. Ohio 1928), is distinguishable on grounds that the defendant was purely a holding company engaged in no actual business except through subsidiaries, and that the defendant showed no facts indicating that the subsidiaries were independent in the conduct of their respective businesses.

Fish v. East, 114 F. 2d 177 (10th Cir. 1940), is not in point because it did not involve a question of jurisdiction but of "substantive rights." See *Cannon Mfg. Co. v. Cudahy Packing Co.*, *supra*.

Sterling Novelty Corp. v. Frank & Hirsch Distributing Co., Ltd., 299 N.Y. 208, 86 N.E. 2d 564 (1949), is not in point because the corporation there served with process was admittedly the *agent* of the defendant.

Sales Affiliates, Inc. v. Superior Court, 96 Cal. App. 2d 134, 214 P. 2d 541 (1950), is similarly not in point because the court there held the "jobbers" on whom process was served "clearly act as agents of petitioner" on the basis of facts not here present.

Fielding v. Superior Court, 111 Cal. App. 2d 490, 244 P. 2d 968 (1952), *cert. denied* 344 U.S. 897, is not in point because it was there shown that the foreign corporation maintained its *representative* in the state to solicit business. The sole question there was whether the nature and quality

of the representative's activity was sufficient to support jurisdiction.

Chicago, M. & St. P. R. Co. v. Minneapolis C. & C. Assn., 247 U.S. 490, 62 L. Ed. 1229, 38 S. Ct. 553 (1918), was held to have "no application" to the jurisdictional question here presented by this Court in the *Cudahy* case.

Blum v. Postal Telegraph, Inc., 54 F. Supp. 898 (W. D. Pa. 1944), is distinguishable on the ground that the facts there showed that the subsidiary did not have its own employees, was not independent financially or adequately capitalized, and filed consolidated financial statements and reports with Federal agencies. Moreover, the parent was a mere holding company conducting no business except through its subsidiaries. Such facts are not present in this record.

Satterfield v. Lehigh Valley R. Co., 128 F. Supp. 669 (S.D.N.Y. 1955), is not in point because the local sales company on which process was served was clearly the *agent* of the foreign corporation, as the excerpt quoted by the New Mexico Court clearly states. The sole question there was whether the activities of that agent were sufficient to support service under the doctrine of *International Shoe*.

Bishop v. U.S., 16 F.2d 410 (8th Cir. 1926), is a case involving "substantive rights" not applicable to the jurisdictional question here involved.

In contrast to the foregoing cases, which are either wholly irrelevant or depend for applicability on facts not existing on the record of this case, the following cases have followed the *Cudahy* case in upholding the jurisdictional insulation of a parent corporation where its subsidiary does not act as its agent and where the business independence of the subsidiary is carefully maintained. *Austad v. U.S.*

Steel Corp., 141 F. Supp. 437 (N.D. Cal. 1956); *Harris v. Deere & Co.*, 128 F. Supp. 799 (E.D.N.C. 1955); *Bergholt v. Hudson Motor Car Co.*, 124 F. Supp. 716 (D. Minn. 1954); *Terry Carpenter, Ltd. v. Ideal Cement Co.*, 117 F. Supp. 441 (D. Neb. 1954); *Dam v. General Electric Co.*, 111 F. Supp. 342 (E. D. Wash. 1953); *Gravely Motor Plow & Cultivator Co. v. H. V. Carter Co.*, 193 F. 2d 158 (9th Cir. 1951); *Echeverry v. Kellogg Switchboard & Supply Co.*, 175 F. 2d 900 (2nd Cir. 1949); *Lane v. Maple Leaf Milling Co. Ltd.*, 87 F. Supp. 741 (S.D.N.Y. 1949); *Amtorg Trading Corp. v. Standard Oil Co. of Calif.*, 47 F. Supp. 466 (S.D.N.Y. 1942); *Moorhead v. Curtis Publishing Company*, 43 F. Supp. 67 (W.D.Ky. 1942); *McLean v. Goodyear Tire & Rubber Company, Inc.*, 85 F.2d 150 (5th Cir. 1936); *Walker v. Ritter-Burns Lumber Co.*, 10 F. Supp. 804 (E.D. Ky. 1935); *Mas v. Nu-Grape Co. of America*, 62 F.2d 113 (4th Cir. 1932).

Although those Federal court decisions, which are in point here, were cited to the New Mexico Court, that Court ignored those cases in reaching its result. Those cases and this Court's decision in *Cudahy* should be determinative of this case; failure of the New Mexico Court even to consider those Federal cases indicates the utter groundlessness of its decision.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully Submitted,

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of Counsel

APPENDIX A

309 P(2) 981

STATE of New Mexico, ex rel. GRINNELL COMPANY, a Colorado Corporation, Grinnell Company, Inc., a Delaware Corporation, Grinnell Corporation, a Delaware Corporation, Petitioners,

v.

The Honorable D. A. MacPHERSON, Jr., Judge of Division Four of The District Court of The Second Judicial District of The State of New Mexico, Respondent.

No. 6174

Supreme Court of New Mexico.

March 29, 1957.

Original prohibition action against D. A. MacPherson, Jr., Judge of Division Four of the District Court of the Second Judicial District, based on alleged improper service of process. The Supreme Court, Sadler, J., held that where three foreign corporations, a parent manufacturing corporation and its two subsidiary selling corporations which had common directors and secretary and bore same basic name were in fact a giant octopus corporation, so that in advertising and sales, there was no distinction between manufacturer corporation and selling corporations, service of process upon the one selling corporation which was qualified to do business in state was sufficient to confer jurisdiction over the other two corporations.

Alternative writ discharged.

1. Corporations

In prohibition proceeding based on alleged insufficiency of service upon corporation, evidence compelled conclusion that parent manufacturing corporation and two subsidiary

selling corporations with same board of directors and secretary and bearing same basic name, with manufacturer designated as "corporation", first seller designated as "company, incorporated", and second seller designated "company", were in fact one giant octopus corporation. 1953 Comp. § 21-3-6(b).

2. Corporations

Where three foreign corporations, a parent manufacturing corporation and its two subsidiary selling corporations which had common directors and secretary and bore same basic name were in fact a giant octopus corporation, so that, in advertising and sales, there was no distinction between manufacturing corporation and selling corporations, service of process upon the one selling corporation which was qualified to do business in state was sufficient to confer jurisdiction over the other two corporations. 1953 Comp. § 21-3-6(b).

—o—

Rodey, Dickason, Sloan, Mims & Akin, Albuquerque, for petitioners.

Simms, Modrall, Seymour, Sperling & Roehl, Thomas J. Smiley, Albuquerque, for respondent.

Opinion

SADLER, Justice.

The relators seek by prohibition to restrain the respondent judge from proceeding in a case pending before him in the district court of Bernalillo County, entitled "Larnie Schultz and Hartford Accident and Indemnity Co., plaintiffs, v. Grinnell Company, defendant," and numbered 63,674 on the civil docket of said court. We granted an alternative writ

upon the filing and presentation of the petition therefor and the matter is now before us in a test of whether the alternative writ was improvidently issued. It will be necessary to state the facts in order to ascertain this fact.

On January 11, 1954, the plaintiff, Larnie Schultz, was employed as a steam fitter by the Flori Piping Erection Company of St. Louis, Missouri, and was working on the construction of the R. E. A. Electrical Plant at Algodones, New Mexico (also called the Plains Electric Generation and Transmission Co-op, Inc.). On the date mentioned while Schultz was astraddle a steel pipe approximately 16 feet above the floor level, the pipe fell to the ground and he along with it, as a result of which he was injured.

At the time of the fall the workmen's compensation insurer of Schultz' employer was the Hartford Accident and Indemnity Company. Since the date of his injury, the insurer has been paying compensation to Schultz in the amount of $30 per week and furnishing medical benefits. Some two years later, on February 3, 1956, Schultz and the insurer, who will be referred to herein as "Hartford", filed suit against Grinnell Company for Schultz' personal injuries and reimbursement to Hartford for compensation benefits previously paid. The complaint alleges that the fall was caused by a defective or faulty metal hanger "manufactured, fabricated or made" and "warranted" by the defendant, Grinnell Company, "a foreign corporation * * * authorized to do business in the State of New Mexico." This hanger is also referred to in the pleadings as an "I-beam" or "pipe hanger."

The Grinnell Company, the named defendant in cause

No. 63,674, is a Colorado corporation with its principal place of business in Denver. It is duly qualified to do business in New Mexico. Service was made on said defendant through its authorized statutory agent, John T. Watson. Purported service was also made on the secretary of state as agent for the Grinnell Company, Inc., and for Grinnell Corporation, pursuant to section 21-3-6(b) which section governs service on foreign corporations doing business in New Mexico but not authorized or qualified to do business in this state. This latter service was made on February 16, 1956. The only affidavit filed with the secretary of state upon such service is attached to the petition for the writ as Exhibit "C."

On March 14, 1956, an answer was filed by the defendant admitting that it was authorized to do business in New Mexico, denying that it manufactured or fabricated the alleged defective metal hanger, and setting up the usual affirmative defenses.

On June 18, 1956, certain pleadings were filed below as follows:

(a) Defendants' motion for summary judgment with affidavit attached thereto, the grounds for such motion being that defendant was not a manufacturer but a distributor of products manufactured by the manufacturing corporation and others, that it did not manufacture the metal hanger as alleged in the complaint, nor did it sell the same to plaintiff Schultz' employer at the time of the accident, Flori Piping and Erection Company.

(b) Grinnell Company, Inc.'s motion to quash purported service of process on the secretary of state as its agent

with affidavit attached thereto asserting that: (1) the process or summons served upon the secretary of state was directed to "Grinnell Company," a separate corporate entity from Grinnell Company, Inc.; (2) an affidavit by the person to whom process was delivered for service was not filed in the office of the secretary of state as required by section 21-3-6(b), 1953 Comp.; (3) Grinnell Company, Inc., did not do business within the state of New Mexico.

(c) Grinnell Corporation's motion to quash purported service of process on the secretary of state as its agent with affidavit attached thereto on the ground that: (1) the process or summons served upon the secretary of state was directed to "Grinnell Company," a separate corporate entity from Grinnell Corporation; (2) the affidavit by the person to whom process was delivered for service was not filed in the office of the secretary of state as required by section 21-3-6(b), 1953 Comp.; (3) Grinnell Corporation did not do business within the state of New Mexico.

On June 29, 1956, plaintiffs below filed separate interrogatories directed to Grinnell Company, Grinnell Company, Inc., and Grinnell Corporation, respectively. Copies of the interrogatories were attached to the petition herein as exhibits. Thereafter, on August 31, 1956, Grinnell Company, Grinnell Company, Inc., and Grinnell Corporation filed separate answers to certain of the interrogatories referred to above and objected to others, said objections relating primarily to interrogatories involving insurance. Copies of the answers also were attached as exhibits to the petition herein.

On October 4, 1956, the motions to quash referred to

above as well as motion for summary judgment by defendant, Grinnell Company, came on for hearing and each, in turn, was denied.

There follow certain allegations in the petition for the writ by the defendant Grinnell Company in which it denies that it either manufactured or sold the allegedly defective metal hanger; that certain metal hangers were sold to plaintiff's employer, Flori Piping Erection Company, by Grinnell Company, Inc., in St. Louis, Missouri, and shipped from that point by the branch office of Grinnell Company, Inc., to the Flori Piping Company of Algodones, New Mexico, where said metal hangers were in fact delivered to the latter company. That said metal hangers were made and fabricated by Grinnell Corporation.

It is further alleged in the petition for the writ that Grinnell Company, Inc., is a foreign corporation, not authorized or qualified to do business in New Mexico, nor actually so engaged at any material time; that Grinnell Corporation is likewise a foreign corporation, not authorized or qualified to do business in New Mexico, nor actually so engaged at any material time; that Grinnell Company and Grinnell Company, Inc., are wholly owned subsidiaries of Grinnell Corporation and that all three corporations are separate legal entities; that three directories of Grinnell Corporation constitute the entire board of directors of Grinnell Company and Grinnell Company, Inc.

It is further alleged in the petition for the writ that the defendant, Grinnell Company, while a foreign corporation, is authorized and qualified to do business in New Mexico. The petition goes on to allege that the books and records of

Grinnell Company are kept entirely separate from the books and records of the Grinnell Corporation and that all employees of Grinnell Company are paid solely by it and receive no compensation from Grinnell Corporation.

[1, 2] The respondent admits most of the allegations of the petition but specifically denies that respondent is without jurisdiction over Grinnell Company, Inc. and Grinnell Corporation, alleging, affirmatively, that the three Grinnell corporations are actually and in fact, "one giant operation of one octopus corporation and as such are amenable to process in New Mexico."

A review of testimony taken on interrogatories in depositions to the parties, being officers of the three separate corporations, Grinnell Company, Grinnell Company, Inc., and Grinnell Corporation, along with exhibits attached to depositions, and admissions to be deduced from the pleadings, is sufficient, as we view the matter, to sustain the charge in the answer, or response to the writ, filed on behalf of the respondent, in this prohibition proceeding:

> "That the three Grinnell Corporations are actually and, in fact, one giant octopus corporation and as such are amenable to process in New Mexico."

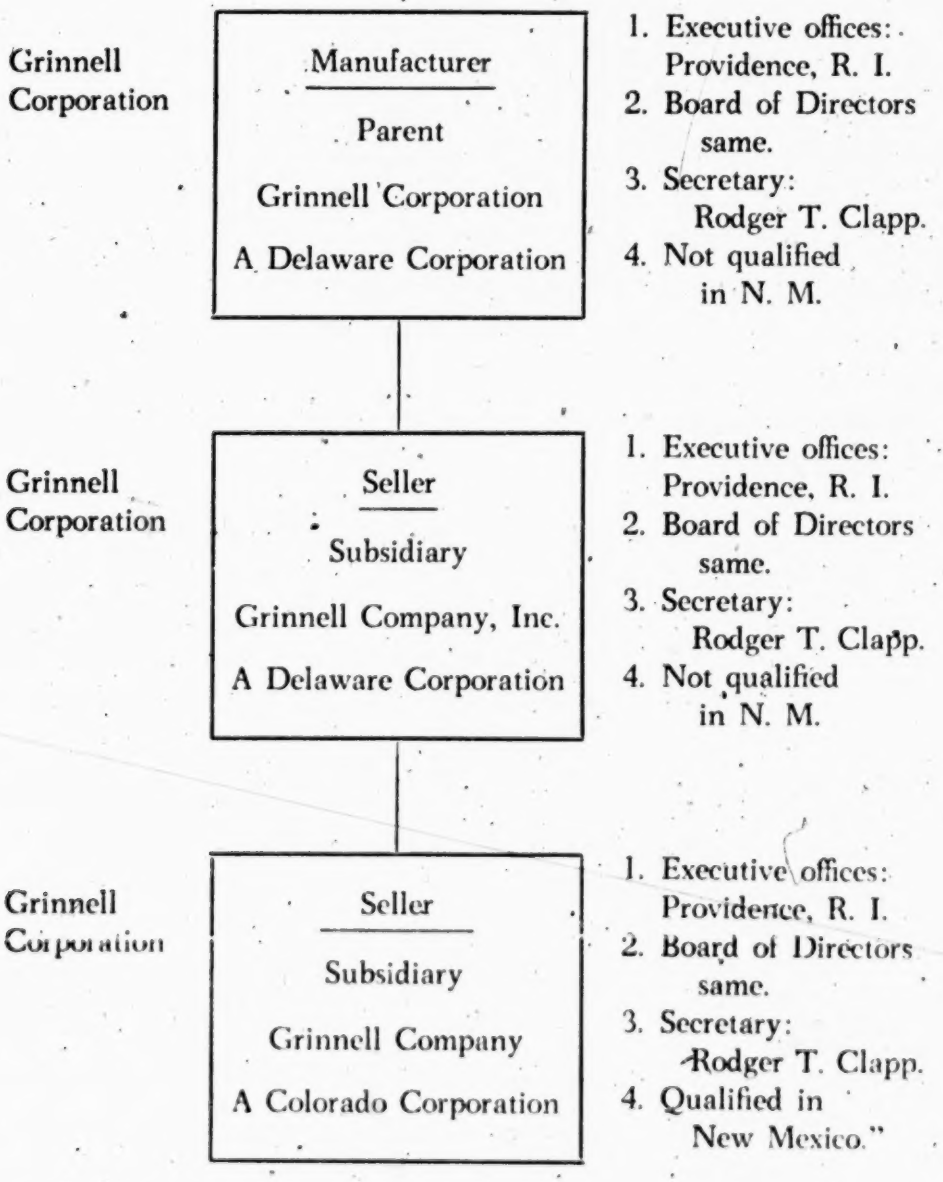
There are so many facets to the widespread operations of the three separate corporations that it would be quite burdensome to attempt an enumeration of all of them. We shall, however, mention some of the more prominent of those leading us to the conclusion announced.

For instance, we shall appropriate Exhibit 16, attached to the brief of respondent, as entitled and reproduced therein. It follows:

Appendix A.

"Exhibit 16

Diagram Graphically Showing the Organization and Relationship of the Grinnell Corporations



As disclosed by Exhibit 16 attached to the answer brief of respondent, and reproduced next above, the Grinnell Corporation, the parent corporation, maintains its executive offices at Providence, Rhode Island, and so do Grinnell Company and Grinnell Company, Inc. All three have the same board of directors, the same secretary, share the same executive offices. The only difference noted by the exhibit, supra, lies in the fact that Grinnell Company has been duly qualified to do business in New Mexico, whereas, Grinnell Company, Inc., and Grinnell Corporation have not. The relators' response to an interrogatory No. 3 addressed to Grinnell Company reads, as follows:

> "Operation of a warehouse in Denver, Colorado from which Grinnell manufactured products and products purchased from others (being principally pipe, pipe fittings, hangers, plumbing and heating equipment) are sold within the territory of such company, including the State of New Mexico. Also operates as contractor selling and installing automatic sprinkler systems in its territory."

The same witness, speaking for his employer, Grinnell Company, in interrogatory No. 6, and asked to explain the relationship between it and Grinnell Company, Inc., stated:

> "A. Grinnell Company and Grinnell Company, Inc. are both wholly owned subsidiaries of Grinnell Corporation. Both companies purchase Grinnell-manufactured materials from Grinnell Corporation and occasionally purchase Grinnell-manufactured or other materials from each other. The executive officers of Grinnell Company, Grinnell Company, Inc., and Grinnell Corporation are the same. Three of the directors of Grinnell Corporation, namely, James D.

Fleming, Clarence H. Rison and Roger T. Clapp, constitute the entire board of directors of Grinnell Company and Grinnell Company, Inc. The books and records of Grinnell Company are entirely separate from the books and records of Grinnell Corporation and all employees of Grinnell Company are paid solely by Grinnell Company and receive no compensation from Grinnell Corporation."

Again, the same witness, speaking now as Secretary of Grinnell Company, Inc., in reply to an interrogatory addressed to that company as to the number of states in which it did business, answered:

"Delaware, Alabama, Arkansas, District of Columbia, Florida, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, Oklahoma, Ohio, Rhode Island, South Carolina, Tennessee, Texas. Qualified in all of the above states. Does business in no other states."

Likewise, the same witness, speaking still as Secretary of Grinnell Company, Inc., gave verbatim the same answer, substantially, as he had to a like inquiry directed to him while speaking as Secretary of Grinnell Company, touching the relationship of the three companies, to-wit:

"Grinnell Company and Grinnell Company, Inc. are both wholly owned subsidiaries of Grinnell Corporation. Both companies purchase Grinnell manufactured materials from Grinnell Corporation and occasionally purchase Grinnell manufactured or other materials from each other. The executive officers of Grinnell Company, Grinnell Company, Inc. and Grinnell Corporation are the same. Three of the

Board of Directors of Grinnell Corporation constitute the entire boards of directors of Grinnell Company and Grinnell Company, Inc."

In the advertising done by the three companies, a common pattern is observed. The petitioners for the writ (relators)—the three of them—are treated as one. Actually, they hold out the name of "Grinnell" to the public and operate as one; a sample of such advertising is attached as Exhibit 17. It is put out under the trade name, "Grinnell." On the last page of this advertising circular appears the heading "Grinnel Sales Offices and Warehouses" under which are listed 34 offices and warehouses including the one at Denver, Colorado. The warehouse in Denver is the sole business of Grinnell Company. No distinction seems to be made between the manufacturing corporation or the various other so called selling corporations.

In addition, we have before us, brought up as an exhibit below, a huge catalogue in which countless articles manufactured and sold by this triumvirate of companies are listed, described and priced. It is described on the outside front cover "Grinnell—Wherever Piping is Involved—Catalog 51."

On the inside of the catalog, at approximately page 5, there is this statement:

"A partnership formed between a patternmaker and a carpenter in 1850 under the name of the Providence Steam & Gas Co., occupying a 40 x 60 foot section of the machine shop of the Providence and Worcester Railroad at Providence, Rhode Island, grew up to be the *Grinnell of today, with seven manufacturing plants and twenty-nine warehouses and*

sales offices located at strategic points throughout the United States and Canada.

"*Through its Supply Sales Division, which operates its Branch warehouses,* the Company sells both Grinnell manufactured and purchased piping products to a wide variety of customers, * * *." (Emphasis added.)

But, why go on? Enough has been shown (and more appears) to demonstrate that, although the three companies are separately incorporated, their separate entities are not preserved in the conduct of their overall business sufficiently to enable them to thrust same forward successfully in a claim of immunity to suit in this state.

A more liberal policy has grown up over the years with respect to what affords due process as to a foreign corporation doing business in another state than that of its creation. Especially is this true in setting up criteria by which its activities are to be judged in a determination whether it is doing business within a sister state, so as to subject it to suits in the courts of such state. See the illuminating opinion of Mr. Chief Justice Stone in International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057, and annotation at 1068.

But this case does not on its facts exactly fit the situation here confronting us. There is here no question but that good service has been made on Grinnell Company. Sufficiency of service on it alone, however, brings little comfort to the plaintiff in the action out of which this proceeding in prohibition grows, unless through the agency of such service others may be brought before the court. The plaintiff

in the action sought to be prohibited must go beyond Grinnell Company and, indeed, to the parent corporation, if he is to have practical relief. This means he must establish service on Grinnell Company, Inc., or Grinnell Corporation, one or both, if he is to be afforded practical relief.

We think under the facts here present it could well be concluded that the parent organization, itself, Grinnell Corporation, was doing business in New Mexico through the agency of one of its subsidiaries, Grinnell Company, and that service on the latter sufficed to authorize the court, upon proper request, to bring before the court by amendment the two counterparts of Grinnell Company, to wit, Grinnell Company, Inc., and Grinnell Corporation. There is ample authority to support such a conclusion. See Compania de Astral, S. A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357, 108 A.2d 372, 49 A.L.R.2d 646, and annotation at page 668; Pergament v. Frazer, D.C., 93 F.Supp. 9; Clover Leaf Freight Lines, Inc., v. Pacific Coast Wholesalers Ass'n, 7 Cir., 166 F.2d 626; Bach v. Friden Calculating Machine Co., 6 Cir., 167 F.2d 679; S. O. S. Co. v. Bolta Co., D.C., 117 F.Supp. 59; General Electric Co. v. Masters Mail Order Co., 122 F.Supp. 797; Industrial Research Corporation v. General Motors Corporation, D.C., 29 F.2d 623; Fish v. East, 10 Cir., 114 F.2d 177; Sterling Novelty Corp. v. Frank & Hirsch Distributing Co., Ltd., 299 N.Y. 208, 86 N.E.2d 564, 12 A.L.R. 2d 1435; Sales Affiliates, Inc., v. Superior Court for Los Angeles, 96 Cal.App.2d 134, 214 P.2d 541; Fielding v. Superior Court, 111 Cal.App.2d 490, 244 P.2d 968, certiorari denied, Westwood Pharmacal Corp. v. Fielding, 344 U.S. 897, 73 S.Ct. 277, 97 L.Ed. 693.

Appendix A.

In S. O. S. Co. v Bolta Co, the court said [117 F.Supp. 61]:

"A circular distributed by the Bolta companies upon the introduction of the Scour Puss appears following page 5 of the plaintiffs' brief. In this circular the principal products of all of the Bolta companies were referred to. No distinction was made between the several companies but the advertisements were carried under the heading 'Bolta proudly presents.' From this and the other advertising appended to the plaintiffs' brief, it is clear that all of the Bolta products were presented in advertising to the public without identification of the particular Bolta companies dealing in the several products.

* * *

"Notwithstanding the common advertising, all sales, billings and bookkeeping records of the Bolta companies are confined to the company which is associated with the particular product.

* * * * * *

"Plaintiffs rely upon the strong line of recent cases typified by Clover Leaf Frieght Lines v. Pacific Coast Wholesalers Association, 7 Cir., 1948, 166 F.2d 626; Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Association, 247 U.S. 490, 38 S.Ct. 553, 62 L.Ed. 1229; and Blum v. Postal Telegraph, Inc., D.C.Pa. 1944, 54 F.Supp. 898.

* * * * * *

"The defendants seek to distinguish the application of these cases by pointing out that they involved a wholly owned and controlling subsidiary, whereas in the instant case no such relationship exists. The application of the principal to a mechanical identity in the nature of the relationship cannot be restricted. It is true that here there is an ingenious variant in the usual method of control; yet it is no

less effective and real. It is accomplished through a family group supplemented by a management contract in the control of the founder of the business.
* * *

"It follows, therefore, that service upon the agent of Bolta Products Sales, Inc. was practical and sufficient service upon all of the Bolta companies."

We quote from Satterfiield v. Lehigh Valley R. R. Co., supra [128 F.Supp. 671], as follows:

"I believe that Millard was 'doing business' in this district within the meaning of 28 U.S.C. § 1391(c). The issue in every case is whether the nature of the foreign corporation's contacts with the judicial district in which it is sued is sufficient to justify subjecting it to suit in that district. Cf. Perkins v. Benguet Consolidated Mining Co., 1952, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485; International Shoe Co. v. State of Washington, 1945, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. In this case Millard's contacts with this district arise out of the activities of R. D. Bates Co. Bates is in effect Millard's sales agent in New York City. The fact that Bates is an independent business organization which receives its compensation in the form of a 'commission' rather than a salary is not controlling. Latimer v. S/A Industrias Reunidas F. Matarazzo, 2 Cir., 175 F.2d 184, certiorari denied, 1949, 338 U.S. 867, 70 S.Ct. 141, 94 L.Ed. 531; Arpad Szabo v. Smedvig Tankrederi A.S., D.C.S.D.N.Y. 1951, 95 F.Supp. 519; cf. Bomze v. Nardis Sportswear, Inc., 2 Cir. 1948, 165 F.2d 33; Sterling Novelty Corp. v. Frank & Hirsch Distributing Co. (Pty.) Ltd., 1949, 299 N.Y. 208, 86 N.E.2d 564, 12 A.L.R.2d 1435. Millard's continuous and long continued activities in this district by which its products are sold through R. D. Bates Co. justify its

being sued in this district even though the suit is not based on a transaction which occurred in this district. * * *

"The remaining question deals with the validity of the manner in which the alleged service of process on Millard was effected. Process was served on an office manager of R. D. Bates Co., one E. H. Johnson. It is well settled that service on the agent whose activities establish that defendant is doing business in the district is sufficient service on the foreign corporation. * * *."

In Bishop v. United States, 16 F.2d 410, 415, the 8th Circuit Court of Appeals said:

"It is well-settled law, as stated by this court in Chicago Mill & Lumber Co. v. Boatmen's Bank, 234 F. 41, 45, that 'when one corporation owns or controls the entire property of another, and operates its plant and conducts its business as a department of its own business, or as its alter ego, it is responsible for its obligations incurred in so doing.' "

The case most relied upon by relators is that of Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 45 S.Ct. 250, 251, 69 L.Ed. 634. The court simply held there that the separation of corporate identity had been sufficiently maintained and on that theory that the defendant sued was not doing business in the jurisdiction of the forum where sued. Said the court:

"The corporate separation, though perhaps merely formal, was real. It was not pure fiction. There is here no attempt to hold the defendant liable for an act or omission of its subsidiary or to enforce as against the latter a liability of the defend-

> ant. Hence, cases concerning substantive rights, like Hart Steel Company v. Railroad Supply Co., 244 U.S. 294, 37 S.Ct. 506, 61 L.Ed. 1148, [other citations omitted] have no application."

The quoted language itself distinguishes that case from this one. The Cannon Mfg. Co. case held that if sufficient separateness between the parent and the subsidiary was maintained, the foreign parent was not subject to the local jurisdiction. However, as pointed out in the article in 56 Cal.L.Rev. 394, at p. 409:

> "The doctrine has been narrowed down by more liberal findings by the courts as to when the parent and its subsidiary are so conducting their affairs that they are no longer separate entities, but merely principal and agent in one organization.
> * * *
>
> "The courts will also take account of representations of a corporation as to where it is conducting its operations. For example, one case has held that where a parent company has represented in its literature that it has an office in a state in which only its subsidiary is engaged in activities, the parent should be taken at its word and be subject to suit in the local forum. Gray v. Eastman Kodak, D.C.E.D.-Pa. 1930, 53 F.2d 864."

In a seven-page comment on the Cannon Mfg. Co. case, supra, the author says that the result "shocks one's common sense." 20 Ill. L.Rev. 281 (1925).

In their reply brief counsel for relators, themselves, have this to say:

> "In the instant case, it is admitted that the activities of Grinnell Company constitute doing business in New Mexico within the rule of *International Shoe* and the only question in this proceeding is whether or not the Grinnell Company is the *alter ego* of Grinnell Corporation and/or Grinnell Company, Inc."

Since this is exactly the situation confronting us here and the service on Grinnell Company is admittedly good, this brings before the Court the two missing corporations, each as an *alter ego* of Grinnell Company, the case only lacking the formality of an amendment to add them as parties defendant.

It follows from what has been said that the alternative writ was improvidently issued and should, therefore, be discharged.

It will be so ordered.

LUJAN, C. J., and McGHEE COMPTON and KIKER, JJ., concur.

APPENDIX B

STATE OF NEW MEXICO

COUNTY OF BERNALILLO

IN THE DISTRICT COURT

LARNIE SCHULTZ and

HARTFORD ACCIDENT AND INDEMNITY CO.

Plaintiffs

-vs- NO. 63674

GRINNELL COMPANY

Defendant.

ORDER

Now upon Defendant's motion for summary judgment, motions to quash service of Grinnell Corporation and Grinnell Company, Inc., and the Court having heard the arguments of counsel and being fully advised in the premises thereupon;

IT IS ORDERED:

That said motions be and the same hereby are denied all of which the moving parties object and except.

s/ D. A. MacPherson, Jr.
District Judge

APPENDIX C

STATE OF NEW MEXICO

COUNTY OF BERNALILLO

IN THE DISTRICT COURT

LARNIE SCHULTZ and
HARTFORD ACCIDENT AND INDEMNITY CO.,

Plaintiffs,

vs. NO. 63674

GRINNELL COMPANY,

Defendant.

ANSWERS OF GRINNELL COMPANY TO INTERROGATORIES PROPOUNDED BY PLAINTIFFS

1. Q. Please state the name and title of the person answering these interrogatories.

   A. Roger T. Clapp, Secretary.

2. Q. What is your business address?

   A. 260 West Exchange Street, Providence, Rhode Island.

3. Q. In what business is the Grinnell Company presently engaging? Kindly describe generally what the Company does as a business, and the manner in which the same is conducted.

A. Operation of a warehouse in Denver, Colorado, from which Grinnell manufactured products and products purchased from others (being principally pipe, pipe fittings, hangers, plumbing and heating equipment) are sold within the territory of such company, including the State of New Mexico. Also operates as contractor selling and installing automatic sprinkler systems in its territory.

4. Q. Please state the names of each and every State in which your Company is authorized to do business.

A. New Mexico and Utah.

5. Q. Kindly state the name of the State in which this Company was first organized as a Corporation, and whether or not said State is still the place of residence of said Corporation.

A. Colorado. Said State is its present "place of residence."

6-27 See Interrogatories for questions.

A. Grinnell Company and Grinnell Company, Inc. are both wholly owned subsidiaries of Grinnell Corporation. Both companies purchase Grinnell manufactured materials from Grinnell Corporation and occasionally purchase Grinnell-manufactured or other materials from each other. The executive officers of Grinnell Company, Grinnell Company, Inc., and Grinnell Corporation are the same. Three of the directors of Grinnell Corporation, namely, James D. Fleming, Clarence H.

Rison and Roger T. Clapp, constitute the entire board of directors of Grinnell Company and Grinnell Company, Inc. The books and records of Grinnell Company are entirely separate from the books and records of Grinnell Corporation and all employees of Grinnell Company are paid solely by Grinnell Company and receive no compensation from Grinnell Corporation.

28. Q. For what specific purpose, or purposes, is Grinnell Company qualified to do business in the State of New Mexico?

A. All purposes.

29. Q. Kindly state the date that Grinnell Company became qualified to do business in the State of New Mexico, and whether or not Grinnell Company has ever forfeited its right to do business in the State of New Mexico.

A. November 8, 1951. Still in effect.

30. Q. Did Grinnell Company ever sell any steel clamps, pipe hangers or I beam holders, or like products in the State of New Mexico? If so, kindly state:

A. Yes.

30-a Q. The name of the manufacturers of said clamps, hangers, holders, or similar devices.

A. Grinnell Corporation and Columbia Malleable Castings Corporation.

30-b Q. From whom Grinnell Company purchased said hangers, clamps, holders, or like products.

A. Grinnell Corporation and Columbia Malleable Castings Corporation.

30-c Q. Has Grinnell Company ever sold to any persons or firms for use, or which might have been used in the REA Plant at Algodones, New Mexico, or in the construction thereof. If so, kindly state full details.

A. Not to our knowledge.

31. Q. Did Grinnell Company ever make an investigation of the accident of January 11, 1954, at the REA Electrical Plant at Algodones, New Mexico, in which the plaintiff was injured?

A. No.

32. A. Not Applicable.

36. Q. Kindly state in detail the relationship of the executive office of Grinnell Corporation at Providence, Rhode Island, to the Grinnell Company. If any orders, directions, suggestions or advices followed by Grinnell Company originate in said executive office, kindly explain in full detail.

A. See answer to questions 6-27 above.

37. Q. Does Grinnell Company manufacture any products, whatsoever? If so, kindly specify.

A. No.

38. Q. Did Grinnell Company sell any products to Flori Pipe Company, or to Flori Piping Erection Company in the year 1953, or late in the year 1954?

A. No.

39. Q. Kindly state the name and address of each and every wholesaler, distributor, jobber, or retailer of Grinnell Company in the year 1953, and prior to January 11, 1954, in the State of New Mexico.

A. Albuquerque Lumber Co.
501 North First Street
Albuquerque, New Mexico

Construction Supply Co.
716 East Main Street
Farmington, New Mexico

Crane Company
612 North First Street
Albuquerque, New Mexico

Charles Ilfeld Co.
Las Vegas,
New Mexico

Southland Supply Co.
Box 1051
Lovington, New Mexico

Brown Pipe & Supply Co.
P. O. Box 35
Artesia, New Mexico

Barry Hardware Co.
Clovis
New Mexico

Crane Company
102 South Virginia Street
Roswell, New Mexico

New Mexico Timber Co.
P. O. Box 63
Albuquerque, New Mexico

Union Industrial Corporation
P. O. Box 710
Carlsbad, New Mexico

40. Q. Kindly state whether or not Grinnell Company has ever sold any pipe hangers, holders or I beam clamps, such as is in question in the present suit, to Sterns-Rogers Company for use in the Albuquerque area during the year 1953, or the year 1954.

A. Some hangers, some 266-5 clamps and other supporting materials were sold to Stearns-Roger Mfg. Co., care of Public Service Company of New Mexico, Person Station, Albuquerque, New Mexico. No shipments were made where the shipment would terminate in Algadones, New Mexico, or at any REA plant.

43. Q. If you have any knowledge concerning a metal hanger used upon Electric Co-op, Algodones, New Mexico, please answer the following:

A. This company has no knowledge.

44. Q. The Third Defense which you have filed herein alleges that the plaintiff had knowledge of, and assumed the risk in question. Kindly state in complete detail, the facts upon which defense is predicated.

A. Mr. Schultz by sitting on the pipe together with another man and attempting to move the pipe through the rings, a procedure in violation of sound practices, created a danger that some part of the equipment used in hanging pipe might break. When further facts regarding this accident are ascertained, additional facts regarding the Third Defense may be uncovered but at the moment the above are all the facts relied on.

45. Q. The Fourth Defense which you have filed herein alleges that the plaintiff was guilty of contributory negligence in connection with said defense. Please state each and every fact upon which said defense is predicated, and the facts upon which you intend to prove such contributory negligence.

A. Mr. Schultz by sitting on the pipe together with another man and attempting to move the pipe through the rings, a procedure in violation of sound practices, created a danger that some part of the equipment used in hanging pipe might break. When further facts regarding this accident are ascertained, additional facts regarding the Fourth Defense may be uncovered but at the moment the above are all the facts relied on.

46. Q. The Fifth Defense asserted in this cause of action was that the accident was unavoidable. Kindly relate in detail the facts upon which the defense is predicated, as well as all facts upon which you intend to prove such defense at the time of trial.

A. Mr. Schultz by sitting on the pipe together with another man and attempting to move the pipe through the rings, a procedure in violation of sound practices, created a danger that some part of the equipment used in hanging pipe might break. When further facts regarding this accident are ascertained, additional facts regarding the Fifth Defense may be uncovered but at the moment the above are all the facts relied on.

47. Q. In reference to the steel pipe which was being hung at the time of the accident in question:

a. The nature of the work being done on the pipe at the time of the accident.

b. The size and length of said pipe.

c. State the exact nature, number and placing of hangers supporting said pipe. Attach a sketch or drawing to your answer.

A. We have no information at the present time in answer to this question other than that contained in the deposition of Larnie Schultz.

48. Q. State the names and present addresses of all witnesses whom you intend to call to testify in your behalf when this matter is brought to trial, and in connection therewith, give the nature of the testimony expected from each such witness.

A. At the present time we have no knowledge of witnesses whom we intend to call to testify. When we have ascertained who will be called, we will give the information called for to you.

49. Q. Does your company publish a circular or catalog, or other advertisement listing a clamp such as was involved in the accident in question, and, if so, please attach hereto a copy of all such material.

A. Yes. Copy attached.

50. Q. If Grinnell Company, or any of its subsidiaries, or related companies sold the hanger in question, please state the name of the salesman or representative with whom such sale was discussed, negotiated or effected.

A. The only information we have is that information contained in the affidavit of Quincy N. Peckham, Manager of Grinnell Company, Inc., which affidavit has been heretofore filed in this cause. The name of the salesman or representative if there were such a person involved in the transaction, does not appear on the invoices.

s/ R. T. CLAPP

ROGER T. CLAPP

Appendix C.

STATE OF RHODE ISLAND

County of Providence . . . . ss

The foregoing instrument was acknowledged before me this 27th day of August, 1956, by ROGER T. CLAPP, Secretary of Grinnell Company, a Colorado corporation, on behalf of said corporation.

s/ Dorothy E. Reaney

Notary Public

My commission expires June 30 1961

WE HEAREBY CERTIFY THAT WE HAVE MAILED A COPY OF THE FOREGOING PLEADING TO OPPOSING COUNSEL OF RECORD THIS 8-30-56
RODEY, DICKASON, SLOAN, MIMS & AKIN

By s/ Jackson G. Akin

APPENDIX D

STATE OF NEW MEXICO

COUNTY OF BERNALILLO

IN THE DISTRICT COURT

LARNIE SCHULTZ and
HARTFORD ACCIDENT AND INDEMNITY CO.,

Plaintiffs,

vs. NO. 63674

GRINNELL COMPANY,

Defendant.

ANSWERS OF GRINNELL COMPANY, INC. TO INTERROGATORIES PROPOUNDED BY PLAINTIFFS

1. Roger T. Clapp, Secretary.

2. Sixteen (16) years.

3. Delaware, Alabama, Arkansas, District of Columbia, Florida, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, Oklahoma, Ohio, Rhode Island, South Carolina, Tennessee, Texas. Qualified in all of the above states. Does business in no other states.

4. Prior to 1951 New Mexico was within the territory served by Grinnell Company, Inc. When the Denver Warehouse was built and Denver and surrounding territory established as an area to be operated by Grinnell Company, a Colorado corporation, which was incorporated July 31, 1951, New Mexico became thereafter territory exclusively served by Grinnell Company.

5. No real estate ever owned by this company in New Mexico. No office ever maintained by this company in New Mexico. Prior to 1951 this company at times installed sprinkler systems in New Mexico and in connection therewith had personal property, to-wit: materials, tools, etc., in New Mexico. After the incorporation of Grinnell Company in 1951 installation of sprinkler systems in New Mexico became thereafter an exclusive function of Grinnell Company.

6. No.

7. 1919. Delaware, still domiciled in Delaware.

8. None.

9. No.

10.-15. Grinnell Company and Grinnell Company, Inc. are both wholly owned subsidiaries of Grinnell Corporation. Both companies purchase Grinnell manufactured materials from Grinnell Corporation and occasionally purchase Grinnell manufactured or other materials from each other. The executive officers of Grinnell Company, Grinnell

Company, Inc. and Grinnell Corporation are the same. Three of the Board of Directors of Grinnell Corporation constitute the entire boards of directors of Grinnell Company and Grinnell Company, Inc.

16. No.

20. See answer to interrogatories 10-15 above.

s/ R. T. CLAPP

ROGER T. CLAPP

STATE OF RHODE ISLAND
County of Providence . . . ss

The foregoing instrument was acknowledged before me this 27th day of August, 1956, by ROGER T. CLAPP, Secretary of Grinnell Company, Inc., a Delaware corporation or behalf of said corporation.

(Seal)

s/ Dorothy E. Reaney

Notary Public

My commission expires June 30 1961

WE HEAREBY CERTIFY THAT WE HAVE MAILED A COPY OF THE FOREGOING PLEADING TO OPPOSING COUNSEL OF RECORD THIS 8-30-56
RODEY, DICKASON, SLOAN, MIMS & AKIN

By s/ Jackson G. Akin

APPENDIX E

STATE OF NEW MEXICO

COUNTY OF BERNALILLO

IN THE DISTRICT COURT

LARNIE SCHULTZ and

HARTFORD ACCIDENT AND INDEMNITY CO.,

Plaintiffs

vs. NO. 63674

GRINNELL COMPANY,

Defendant.

ANSWERS OF GRINNELL CORPORATION TO INTERROGATORIES PROPOUNDED BY PLAINTIFFS

1. Roger T. Clapp, Secretary and Counsel.

2. Sixteen (16) years.

3. I am Secretary of Grinnell Company, Inc., and Grinnell Company but receive no compensation from these companies for this service. Otherwise I have never been employed by the Grinnell Company, Inc., or the Grinnell Company.

4. There are no employees employed by Grinnell Corporation who are also employees of Grinnell Company or Grinnell Company, Inc. The number of employees of Grinnell Corporation who

have been employees of Grinnell Company or Grinnell Company, Inc. is negligible.

5. Yes, Grinnell Company, Inc. and Grinnell Company are wholly owned subsidiaries of Grinnell Corporation.

6. Manufacture and sale of pipe, valves, fittings, hangers, automatic sprinkler systems, power and process piping systems, industrial humidification systems.

7. Delaware.

8. Georgia, New York, North Carolina, Ohio, Pennsylvania and Rhode Island.

9. No.

10. No.

11. No.

12. Not applicable.

s/ R. T. CLAPP

ROGER T. CLAPP

Appendix E.

STATE OF RHODE ISLAND
County of Providence . . . ss

The foregoing instrument was acknowledged before me this 27th day of August, 1956, by ROGER T. CLAPP, Secretary of Grinnell Corporation, a Delaware corporation, on behalf of said corporation.

(Seal)

s/ Dorothy E. Reaney

Notary Public

My commission expires June 30 1961

WE HEAREBY CERTIFY THAT WE HAVE MAILED A COPY OF THE FOREGOING PLEADING TO OPPOSING COUNSEL OF RECORD THIS 8-30-56

RODEY, DICKASON, SLOAN, MIMS & AKIN
By s/ Jackson G. Akin

No. 226

~~No. 1126~~

Office - Supreme Court, U.S.
FILED
JUL 30 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

STATE OF NEW MEXICO, ex rel.,
GRINNELL COMPANY, a Colorado Corporation,
GRINNELL COMPANY, INC., a Delaware Corporation
GRINNELL CORPORATION, a Delaware Corporation,
Petitioner,

vs.

THE HONORABLE D. A. MACPHERSON, JR.
Judge of Division Four of the District
Court of The Second Judicial District
of the State of New Mexico
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1957

No. 1126

STATE OF NEW MEXICO, ex rel.,
GRINNELL COMPANY, a Colorado Corporation,
GRINNELL COMPANY, INC., a Delaware Corporation
GRINNELL CORPORATION, a Delaware Corporation,
Petitioner,

vs.

THE HONORABLE D. A. MACPHERSON, JR.
Judge of Division Four of the District
Court of The Second Judicial District
of the State of New Mexico
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

CERTIORARI TO THE UNITED STATES SUPREME COURT SHOULD BE DENIED FOR LACK OF JURISDICTION TO REVIEW THE DECISION OF THE NEW MEXICO SUPREME COURT BECAUSE A FEDERAL QUESTION HAS NOT BEEN PROPERLY PRESENTED.

It is doubtful that this Court should exercise its discretion and review by certiorari the determination of the Supreme Court of the State of New Mexico of the matter

presented in the petition here. Special and important reasons are required for review by certiorari, in order to protect this Court from being overwhelmed with a mass of litigation.

Respondent, at the outset, questions the presentation of a Federal question below, and the required preservation of a substantial Federal question here, notwithstanding the affirmative statement by petitioner, (Petition, p. 5), of Constitutional provisions being involved, namely: Point 1. Amendment XIV, Section 1, Clause 2—Due Process and Point 2. Article I, Section 8, Clause 3—Regulation of Commerce. It is noted that petitioner makes no reference whatsoever in its petition and brief, in support thereof, to ever having raised the Constitutional issue of Point 2 below, (Petition, p. 9), and the reference made by petitioner to Point 1 readily discloses that, if the Federal question was ever raised below, it was clothed in secrecy and innuendo, and not clearly set forth as required. Respondent, therefore, submits that before proceeding further, this Court should deny petitioner its jurisdiction, and the petition should be denied.

The rule requiring jurisdiction and preservation of a substantial Federal question, in order to confer jurisdiction upon this Court, has been frequently repeated. The general rule as to what must appear in order to justify the United States Supreme Court in taking jurisdiction to review a decision of the state court was laid down by Mr. Justice Story, in *Crowell* v. *Randell*, 35 U.S. (10 Pet.) 368, 9 L.Ed. 458, where he said:

> "The period seems now to have arrived in which the court should, upon a full review of all the cases, with a view to close, if possible, all future controversy on the point, reaffirm the interpretation which they have constantly maintained. It is that, to bring a case within

the 25th section of the Judiciary Act, it must appear upon the face of the record: 1. That some one of the questions stated in that section did arise in the state court. 2. That the question was decided by the state court, as required in the same section. 3. That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, *ipsissimis verbis*, but that it is sufficient if it appears, by clear and necessary intendment, that the question must have been raised and must have been decided in order to have induced the judgment. 4. That it is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the state court to the case."

The rules thus formulated by Mr. Justice Story, although they did not, as he had hoped, close all future controversy on the point, have in general been adhered to by the court since that time, even though there have been some changes in the Statutes effecting the mode of review and in some respects, the decisions of the state courts, which are reviewable.

The statutory authority which the petitioners rely upon, as conferring this Court jurisdiction to review the decision of the New Mexico Court, is 62 Stat. 929, June 25, 1948, c. 646, 28 U.S.C. 1257 (3). This statute requires that, "... where any title, right, privilege or immunity is specially set up or claimed under the Constitution," the Supreme Court has jurisdicton to review a decision of a state court. The provision that the claim of a Federal right must be "specially set up or claimed" has been interpreted as requiring the right to have been previously raised in a timely manner and presented for decision to the highest court of the state. Thus, a preliminary step in showing that the state court's decision turned on a Federal question, one which the United States Supreme Court has uniformly

recognized as essential, is to show that a Federal question actually arose in the case. *Lynch* v. *New York ex rel Pierson*, 293 U.S. 52, 79 L.Ed. 191, 55 S.Ct. 16, 17.

A second essential step in showing that the state court's decision actually turned upon a Federal question, is to show that the state court actually had presented to it, actually passed upon, and actually decided a question of this character, necessary to determination of the cause. *Southwestern Bell Telephone Company* v. *Oklahoma*, 303 U.S. 206, 82 L.Ed. 751, 58 S.Ct. 528; *Honeyman* v. *Hannan*, 300 U.S. 14, 81 L.Ed. 476, 57 S.Ct. 350; *New York ex rel Rosevale Realty Company* v. *Kleinert*, 268 U.S. 646, 69 L.Ed. 1135, 45 S.Ct. 618. Thus, jurisdiction cannot be founded upon mere surmise that the decision of the state court turned upon a Federal question. *Lynch* v. *New York ex rel Pierson*, supra; *Adams* v. *Russell*, 229 U.S. 353, 57 L.Ed. 1224, 33 S.Ct. 846. Even if the state court has passed upon the Federal question, it must appear that it has been a substantial one. *House* v. *Road Improvement Dist.*, 266 U.S. 175, 69 L.Ed. 229, 45 S.Ct. 60.

A third essential which the appellant has omitted in his argument is a showing that the Federal question, which he bases his arguments upon, actually appears in the record. In reviewing the decision of a state court, the Supreme Court is bound by the record upon which the judgment is based, *Hedgebeth* v. *North Carolina*, 334 U.S. 806, 92 L.Ed. 739, 68 S.Ct. 1185, and it must be guided by that record as to whether the Federal question was seasonably raised. *Rooker* v. *Fidelity Trust Co.*, 261 U.S. 114, 67 L.Ed. 556, 43 S.Ct. 288.

In the immediate case, the appellant has completely omitted to affirmatively establish that the Federal question was properly raised in a timely manner. It should appear

from the record affirmatively, or by fair implication, that the decision of the Federal question was necessary to the determination of the cause. *Southwestern Bell Telephone Co.* v. *Oklahoma*, supra. In other words, as stated in *Moore* v. *Mississippi*, 88 U.S. (21 Wall.) 636, 22 L.Ed. 653, the United States Supreme Court is not required to re-examine the judgment of a state court simply because a Federal question may have been decided. This rule that the United States Supreme Court will not review the judgment or decree of a state court, where the record shows that it was, or may have been, rendered on a sufficient ground, which did not involve a Federal question, applies to cases involving both Federal and nonfederal questions, not only where the record discloses that the state court rested its judgment on both grounds, but also where it is not clear which of them was relied on, provided in both cases the nonfederal ground was sufficient in itself to sustain the judgment.

This rule is thus stated in *Seaboard Air Line Railway* v. *Duvall*, 225 U.S. 477, 56 L.Ed. 1171, 32 S.Ct. 790, 791, 792, 793 which arose out of a personal injury action, as the case at bar does.

> "That there was set up and denied some claim or right under the Constitution or a statute of the United States must appear upon the record. . . ."
>
> "This case does not come here from a Federal court, and we are therefore not a court of general review. It comes under § 709, Rev. Stat., and the power to review a judgment of a state court is limited and defined by that provision. . . ."
>
> "It was the obvious duty of counsel, if they wished any particular construction of the act, to put the request in such definite terms as that the attention of the court might be directed to the point, and the record here should show that the right now claimed was the right 'specifically set up' and denied by the court. 'It must

appear on the face of the record that it was in fact raised; that the judicial mind of the court was exercised upon it; and then a decision against the right claimed under it'. Or, at all events, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the act, so directly involved that the court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error. Maxwell v. Newbold, 18 How. 515, 15 L. ed. 508; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Gillis v. Stinchfield, 159 U.S. 658, 40 L. ed. 205, 16 Sup. Ct. Rep. 131; Speed v. McCarthy, 181 U.S. 269, 275, 276, 45 L. ed. 855, 858, 859, 21 Sup. Ct. Rep. 613; Gaar, S. & Co. v. Shannon, decided at present term (223 U. S. 468, 56 L. ed.—, 32 Sup. Ct. Rep. 236). In Appleby v. Buffalo, 221 U. S. 524, 529, 55 L. ed. 838, 840, 31 Sup. Ct. Rep. 699, this court said:

"This court has had frequent occasion to say that its right to review the judgment of the highest court of a state is specifically limited by the provisions of § 709 of the Revised Statutes of the United States. This right of review in cases such as the one at bar depends upon an alleged denial of some right, privilege, or immunity specially set up and claimed under the Constitution or authority of the United States, which it is alleged has been denied by the judgment of the state court. In such cases it is thoroughly well settled that the record of the state court must disclose that the right so set up and claimed was expressly denied, or that such was the necessary effect, in law, of the judgment. Sayward v. Denny, 158 U. S. 180, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220."

"In conclusion, we are of opinion that neither the instructions denied nor that objected to are sufficient to raise any Federal question which this court may review. The motion to dismiss the writ for want of jurisdiction is therefore granted."

In the case of *Whitney* v. *California*, 274 U.S. 357, 360, 361, 71 L.Ed. 1095, 47 S.Ct. 641, 643, which was a criminal case, it was held:

> "(1) It has long been settled that this Court acquires no jurisdiction to review the judgment of a State court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such State court. Crowell vs. Randell, 10 Pet. 368, 392, 9 L. Ed. 458, Railroad Co. v. Rock, 4 Wall. 177, 180, 18 L. Ed. 381; California Powder Works v. Davis, 151 U. S. 389, 393, 14 S.Ct. 350, 38 L. Ed. 206; Cincinnati, etc., Railway v. Slade, 216 U.S. 78, 83, 30 S.Ct. 230, 54 L. Ed. 390; Hiawassee Power Co. v. Carolina-Tenn. Co., 252 U.S. 341, 343, 40 S.Ct. 330, 64 L. Ed. 601; New York v. Kleinert, 268 U.S. 646, 650, 45 S.Ct. 618, 69 L. Ed. 1135.
>
> "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a Federal nature. Dewey v. Des Moines, supra, 199 (19 S. Ct. 379); Keokuk & Hamilton Bridge Co. v. Illinois, supra, 634 (20 S.Ct. 205). And this necessarily excludes from our consideration a question sought to be raised for the first time by the assignments of error here—not presented in or passed upon by the Court of Appeal, . . . by reason of the rulings of that court on questions of pleading, evidence and the like, operated as a denial to the defendant of due process of law. See Oxley Stave Co. v. Butler Company, 166 U. S. 648, 660, 17 S.Ct. 709, 41 L. Ed. 1149; Capital City Dairy Co. v. Ohio, supra, 248 (22 S.Ct. 120); Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123, 134, 34 S.Ct. 874, 58 L. Ed. 1245; Bass, etc., Ltd., v. Tax Commission, 266 U.S. 271, 283, 45 S.Ct. 82, 69 L. Ed. 282."

Without variation, this Court has followed the foregoing prerequisite before reviewing by certiorari a state

court decision. See also *Bailey* v. *Anderson*, 326 U.S. 203, 90 L.Ed. 3, 66 S.Ct. 66.

The questions which this petitioner sought to present to the Supreme Court of New Mexico for determination, are stated by petitioner in the Petition for Writ of Prohibition, addressed to that Court. (R. 1 to 5) Petitioner there did not raise either of the Federal Constitutional provisions now asserted as grounds for jurisdiction. Fruitless search has been made of the Petition for Writ of Prohibition filed in the New Mexico Court for a reference to either clause of the Constitutions presented here for the first time, but not even a mention of the term "due process" or "regulation of commerce" can be found. In Petition for Writ of Prohibition, the issues are ordinarily established by the petition and response, but an examination of the response and the affirmative defenses to the Alternative Writ of Prohibition, (R. 54 to 57) again discloses no issue involving the presently asserted Constitutional provisions.

Although the briefs of the parties are no part of the record, and a claim of jurisdiction cannot be sustained by reference to briefs, *Lynch* v. *New York ex rel Pierson*, supra, it should be stated that below the petitioner submitted a 19 page Brief-in-Chief, but no mention of a Federal question is found there. The respondent filed an Answer Brief of 34 pages below and, again no Federal question was presented. The Reply Brief of petitioner consisting of 23 pages presented no substantial Federal question, although petitioner once mentioned the phrase, "due process". Under the authority cited above, it is readily apparent that petitioner failed to present a substantial Federal question before the Supreme Court of New Mexico.

The decision of the New Mexico Court was not predicated upon a Federal question. (R. 91 to 105). True, in the

14 page well-reasoned, thoroughly documented opinion, Mr. Justice Sadler, speaking for a unanimous court, did once use the words, "due process", but that alone does not even indicate that the determination of that court was founded upon a Constitutional provision. On the contrary, the New Mexico Court bottomed its position on a question of fact, and thereto applied the rules of principal and agent and held, as a matter of fact, that Grinnell Corporation and Grinnell Company, Inc. were each "an alter ego" of the corporation qualified to do business in New Mexico. Petitioner here would have a trial de novo. No Federal question was the basis of the New Mexico decision. Indeed, the determination of a Federal question was not necessary to dispose of the issues. Accordingly, the Petition for Writ of Certiorari should properly be denied forthwith.

REPLY TO PETITION FOR WRIT OF CERTIORARI

Reply to the Petition for Writ of Certiorari is probably unnecessary in view of the foregoing. Nevertheless, Respondent will briefly answer the Petition and for the convenience of the reader will adopt and follow the style used by petitioner.

Jurisdiction

Under the title of Jurisdiction, petitioner alleges that 28 U.S.C. 1257 (3) confers jurisdiction on this court (Petition, p. 2). This argument has been answered by respondent above. Petitioner then attempts, without statutory authority, to invoke jurisdiction upon the grounds that the New Mexico decision stands alone and is catastrophic, not only to petitioner, but to the entire national business community. (Petition, p. 2). The zeal of advocacy has carried petitioner far afield.

The contention of petitioner that the New Mexico decision is without precedence, (Petition, p. 3) is readily refuted by reference to the New Mexico decision alone, (R. p. 101) where eleven of the many cases on this subject are cited by the New Mexico Court, as precedence. Petitioner also alleges that the New Mexico decision is in conflict with the prior adjudications of this court, (Petition, p. 3) and such argument is equally unfounded, as the New Mexico Court, contrary to doing violence to the rule of *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333, 69 L.Ed. 634, 45 S.Ct. 250 and *International Shoe Co.* v. *Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154, actually made its decision within the frame-work of those cases. Likewise, the assertion by petitioner that the New Mexico decision "stands in direct conflict with . . . principals of law generally deemed well-established" (Petition, p. 3) is without basis, as vast authority cited by the New Mexico Court and the additional authority cited herein readily discloses.

Flying in the face of the expressed language of the Supreme Court of New Mexico, petitioner interprets the holding of that court to be founded solely upon the use of a common trade name. (Petition, p. 4) Petitioner states, "That Court did not find that the subsidiary was the agent of the foreign corporation . . ." and, therefore, the decision ". . . should not be permitted to stand." The essence of the argument here, by petitioner, is that the New Mexico decision, not being predicated upon the principals of agency, this court should reverse such decision. The only reasonable inference that can be drawn from such argument is that if the New Mexico decision is in fact founded upon agency, then petitioner concedes the decision is proper. The New Mexico Court states that "agency" was required if, ". . . the plaintiff in the action, out of which this proceeding in prohibition grows . . ." (R. 100) was ". . . to be afforded practi-

cal relief." (R. 101). In the following paragraph of the New Mexico decision, the court then held that the required "agency" existed, and the New Mexico decision concluded with the following paragraph:

> "Since this is exactly the situation confronting us here, and the service on Grinnell Company is admittedly good, this brings before the court the two missing corporations, each as an *alter ego* of Grinnell Company ..." (R. 104)

It is, therefore, submitted by the respondent that, predicated upon petitioner's argument, the New Mexico Court having found the required agency and having rendered its opinion thereon, the New Mexico decision is not only sound and based upon persuasive precedent but this court should summarily deny the Petition for Writ of Certiorari.

Petitioner belabors the injured plaintiff in the original action from which this proceeding arises for delaying the assertion of his claim. However, petitioner does not point out that the complaint was filed within the statutory period of limitations in New Mexico, nor does it mention the very serious and permanent injuries sustained by the plaintiff, Larnie Schultz, and the long period of hospitalization and protracted treatment required. Neither does the petitioner mention the time which was consumed in fruitless negotiations toward settlement with the petitioner and its insurance carrier. Furthermore, the petitioner shows no prejudice by such rightful delay.

Questions Presented For Review

1. For the first time, petitioner now raises questions not presented in the case previously.

Here again, petitioner contends the decision of the New Mexico Court was not rendered upon the principals of

agency but merely upon the use of a common trade name. (Petition, p. 5) As this argument has been refuted above, more will not be said.

2. The ascertainment by petitioner that the New Mexico decision is in violation of the Commerce Clause should not only be denied, since it is raised here for the first time, but also for the reason that such a contention is absurd and contrary to fact.

Constitutional Provisions Involved

This twofold attack was not made in the Courts of New Mexico and, therefore, as pointed out above, the entire petition should fail.

Statement of the Case

1. The chronology stated by petitioner is substantially correct, but the inference that the service upon the foreign corporation was "admittedly" defective, is improper. The petitioner in the original action below alleged the service was defective. (R. 18 and 23) However, this was contrary to the position of the plaintiff below and petitioner's contention certainly is not in harmony with the decision of the New Mexico Court interpreting a New Mexico Statute. (Sec. 21-3-6 N.M.S.A. 1953)

2. Petitioner's Statement of Facts is hardly correct, much less complete.

   (a) Grinnell Company is undoubtedly a Colorado corporation, qualified and doing business in New Mexico, and has a statutory agent if not an office within the confines of the State of New Mexico. Although, perhaps, Grinnell Company as such did not manufacture and sell the defective metal hanger in question, certainly it was

the agent for the principal Grinnell Corporation which did manufacture such hanger and its co-agent Grinnell Company, Inc. sold such hanger.

(b) Grinnell Company, Inc. although a Deleware corporation, was found by the Supreme Court as a matter of fact to be doing business in New Mexico.

(c) The statement that Grinnell Corporation was "not in fact" doing business in New Mexico, is contrary to the finding of the Supreme Court of New Mexico.

(d) The three Grinnell Companies do business under the same roof, through the same individuals.

(e) Although petitioner alleged below that each of the subsidiaries employed and paid their own employees, (R. p. 8) the same was denied by the respondent. (R. 55)

(f) The allegations that subsidiaries conduct their business separate and distinct from the parent, was alleged below, but certainly not admitted by the respondent.

(g) The petitioner alleged separation of records and bank account before the Supreme Court of New Mexico, but the same was denied by the respondent. (R. 55)

The alleged failure of the respondent to submit evidence concerning the day to day business operations of the petitioner was because the burden of proof was upon petitioner, in which it is apparent that it failed. Furthermore it was respondent's desire not to delay the action.

The repeated assertion, by the petitioner, that the "sole

evidence" to support the New Mexico decision was the use of a common trade mark, is not only denied, but a review of the New Mexico decision will readily prove the contrary. Furthermore, reference to advertising material distributed by Grinnell, shows not only the use of the common trade name, but contrary to petitioner's contention of separate entities, a full-blown plan of common advertising in general, and an express "holding out" of a completely unified and integrated single organization. Referring to the advertising circular of petitioner, of which respondent obtained a copy, (R. 47) it is noted that the petitioner itself shows the Colorado corporation as merely a sales office and warehouse of the parent corporation. Proof that the Colorado corporation exists in name alone, and is in fact but an agent of this octopus corporation, is shown by petitioner's own advertising where the Colorado corporation is merely listed as a Denver office, being one of 34 strategically located warehouses scattered throughout the continent. Reference is also made in this same connection to Exhibit 15 below, which the petitioner did not include as part of the record, but which the respondent has separately submitted under the certificate of the Clerk of the Supreme Court of the State of New Mexico, and which completely substantiates the agency holding of the New Mexico Court.

3. The Constitutional question which has been raised has been thoroughly discussed above and is not restated here.

POINT I

Exercise of Jurisdiction Over Petitioner by the New Mexico Court Does Not Violate the Due Process Provisions of the United States Constitution.

The prior pronouncements of this Court, cited under Point I by petitioner, are not only recognized by respondent,

but the rules enunciated therein are conceded. However, such pronouncements rather than supporting petitioner, actually sustain respondent. Even petitioner acknowledges that Grinnell Company was qualified to do business in New Mexico with a duly designated statutory agent in that state, and that the service of process was properly made upon such agent. Certainly then, as the New Mexico Court held, it must be admitted by all that Grinnell Company was "present" in New Mexico, and that Grinnell ompany was "found" in New Mexico. Clearly, the "certain minimum contacts" were present, as were the required "contacts" "ties" and "relations".

Cannon Mfg. Co. v. *Cudahy Packing Co.*, supra, involved the review of a Federal Court case, rather than a State Court decision. No Constitutional question was presented, or decided, and the trial court concluded, "upon the evidence that the defendant was not present in North Carolina." Patently, this Court is not the trier of fact in matters of this nature, but a court of review. In the case at bar, the New Mexico trial court, on the Motion to Quash "found" petitioner in New Mexico, and the New Mexico Supreme Court on Writ of Prohibition, likewise "found" the petitioner "present" in New Mexico.

The holding of the court in the Cannon case was that, under the facts of that particular case, separate corporate entity had been sufficiently maintained. Under the facts of the instant case, the New Mexico Courts held that the separate corporate entity had not been sufficiently maintained but, on the contrary, "that the three Grinnell Corporations are actually and, in fact, one giant octopus corporation and as such are amenable to process in New Mexico." (R. 96)

International Shoe Co. v. *Washington*, supra, originated in a state court, as does the instant action, and it was therein held that the operation of a corporation, which

established "sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice", shall be subject to the jurisdiction of such state court. The New Mexico Court found, and petitioner does not deny, that the operations of Grinnell Company, not only established ties and contacts in New Mexico, but that, it was actually "doing business" in New Mexico. Certainly, it is "reasonable and just, according to our traditional conception of fair play and substantial justice" to hold petitioner answerable in New Mexico to Larnie Schultz for the grave and serious injuries resulting to him from the breach of duty by Grinnell. If steam fitter, Larnie Schultz, who was made permanently disabled by the negligence of Grinnell, is denied his right to sue in New Mexico, then he is forever and effectively denied his day in court, and his wife will be forced, throughout the balance of her life, to take in washing and ironing, in a feeble attempt to supplement his support.

New Mexico has followed the precept of Mr. Justice Black in his separate opinion in *International Shoe Co.* v. *Washington*, 326 U.S. at 324, and has opened "the doors of its courts for its citizens to sue corporations whose agents do business in" that state. Grinnell Company is the agent of Grinnell Corporation and Grinnell Company, Inc. and Schultz, a citizen of New Mexico, by ruling of the highest court of that state, has been accorded the right to sue in the courts of that state; this court should not now deny him such relief, notwithstanding the solicitation to the contrary.

POINT II

Jurisdiction of Respondent Over Petitioner is Not a Violation of the Commerce Clause of the United States Constitution.

Petitioner's Point is not well taken because he failed to

raise it in a timely manner and because the cases he cites here are not applicable. The petitioner's prime authority is *Michigan Cent. R. Co.* v. *Mix*, 278 U.S. 492, 73 L.Ed. 470, 49 S.Ct. 207, where a resident of Michigan was killed in Michigan while being employed there by a Michigan railroad corporation. The court held that the suit could not be filed in Missouri where the only ostensible purpose was that of bringing the suit at a place where the chances of recovery would be better. The court felt that such an action would violate the traditional conception of fair play and substantial justice. The other authorities cited by Petitioner, under this Point, follow the holding of this case.

The statement by petitioner that the New Mexico decision will wreck the national business economy, has no basis in fact.

POINT III

The Decision of the New Mexico Supreme Court is Well Founded in Precedent and Conforms to the Decision of this Court, as Well as the Weight of Authority.

Under this Point, petitioner contends that the authority cited by the New Mexico Court is inapplicable, upon the grounds generally that in the cases cited agency was found as a basis for those decisions. The reason is unknown, but petitioner consistently contends that the New Mexico decision has no relevancy to the doctrine of agency. As has been pointed out previously by respondent, this contention is directly opposed to the very language of the New Mexico decision and, therefore, the authority cited by the New Mexico Court is not only appropriate but fully substantiates the New Mexico decision.

Petitioner, in turn, cites cases where the courts found that there had been in fact a sufficient separation of the corporate identity. Naturally, those cases are not in point here because of distinguishable factual situations.

In recent years, huge industrial empires have been developed through the media of interlocking directorates and a majority stockholder's domination of one corporation by another, thereby giving rise to intricate inter-corporate relationships. Because of the adoption of this type of organization, where the separate existence of the component parts is often more ostensible than real, the problem of recognition of corporate entities has assumed considerable importance under varying circumstances.

In the immediate case, the New Mexico Supreme Court has decided that there was in effect one giant corporation and that corporate entity had not been sufficiently preserved to prevent the service of process upon the subsidiary from being effective upon the parent. The Court found factors in addition to the complete stock ownership which were sufficient to convince them that the form of corporate separation was a mere fiction and that the substance of the transaction was that there was really only one corporation. Corporate separation had not been properly maintained and the subsidiary was only a mere agent or instrumentality of the foreign parent. Thus, the Court held that the foreign parent corporation was "doing business" within the state so as to be amenable to the state's jurisdiction for service of process.

As a general rule, the mere ownership and control of the stock of another corporation which is doing business within that state is not enough to constitute doing business within that state by the foreign parent corporation so as to subject it to the jurisdiction of the state for service of

process. *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, supra. Thus, where the corporate entity has been maintained, a parent and its subsidiaries are, without more, considered as separate and distinct, with each being held responsible only for its own acts and obligations. *Garber* v. *Bancamerica-Blair Corp.*, 205 Minn. 275, 285 N.W. 723. However, if the subsidiary is so controlled and its affairs are so conducted that it is a mere department or subdivision of a unified economic enterprise, there will be no compulsion to give the subsidiary recognition as a separate concern. The fiction of corporate entity may be disregarded, under certain conditions such as the instant case, and service of process on a local subsidiary corporation will constitute effective service on the foreign parent corporation. *Fish* v. *East*, 114 F.2nd 177 (10th Cir. 1940); *Mas* v. *Orange-Crush Co.*, 99 F.2nd 675 (4th Cir. 1938); *Atlantic Greyhound Lines* v. *Metz*, 70 F.2nd 166 (4th Cir. 1934); *cert denied*, 293 U.S. 562, 79 L.Ed. 662, 55 S.Ct. 73; *Industrial Research Corp.* v. *General Motors Corp.*, 29 F.2nd 623 (D.C., N.D. Ohio 1928).

In the case of *Industrial Research Corp.* v. *General Motors Corp.*, supra, the court, in addition to the other factors, relied upon the advertising of the parent corporation: "... which imply most clearly that the alleged local agencies, although distinct corporations, are mere adjuncts to the business of the ..." parent corporation. There the court held that the subsidiary was a "mere instrumentality or adjunct" of the foreign corporation and disregarded the corporate entity for service of process.

It is submitted that in proceedings such as this, the legal presumption favors affirmation, and the burden of proof rests upon the petitioner. It is further submitted that the petitioner has utterly failed to develop facts or cite controlling authority to warrant the reversal.

CONCLUSION

The New Mexico Court did not base its decision on Federal grounds but found that the separate corporate entity of the petitioner had not been sufficiently preserved, and therefore that the foreign parent corporation was amenable to the service on the subsidiary.

The court states that the question is not whether there has been sufficient service to satisfy the requirements of due process, because there is no question but that good service has been made on the Grinnell Company. The decision of the court was "... that the parent organization, itself, Grinnell Corporation, was doing business in New Mexico through the agency of one of its subsidiaries, Grinnell Company, and that service on the latter sufficed..." as service on the parent company. (R. 101)

Thus, for the reason that a substantial Federal question is not involved, that a claim of Federal right was not properly raised or presented to the New Mexico Court and does not appear in the record, and because the New Mexico Court did not consider Constitutional issues posed now for the first time by petitioner, and because the decision of the New Mexico Court is based on substantial, independent, non-federal grounds, the respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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